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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

DRAFT ARTICLES ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES AND COMMENTARIES THERETO, ADOPTED ON SECOND READING BY THE INTERNATIONAL LAW COMMISSION AT ITS FORTY-SIXTH SESSION

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PART I. INTRODUCTION

Article 1

Scope of the present articles 1/

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Commentary

(1) Paragraph 1. The term "uses" as employed in article 1 derives from the title of the topic. It is intended to be interpreted in its broad sense, to cover all but navigational uses of an international watercourse, as indicated by the phrase "for purposes other than navigation".

(2) Questions have been raised from time to time as to whether the expression "international watercourse" refers only to the channel itself or includes also the waters contained in that channel. In order to remove any doubt, the phrase "and of their waters" is added to the expression "international watercourses" in paragraph 1. The phrase "international watercourses and of their waters" is used in paragraph 1 to indicate that the articles apply both to uses of the watercourse itself and to uses of its waters, to the extent that there may be any difference between the two. References in subsequent articles to an international watercourse should be read as including the waters thereof. Finally, the present articles would apply to uses not only of waters actually contained in the watercourse, but also of those diverted therefrom.

(3) The reference to "measures of conservation and management, related to the uses of" international watercourses is meant to embrace not only measures taken to deal with degradation of water quality, notably uses resulting in pollution, but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control, erosion, sedimentation and salt

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1/ Initially adopted as article 2 in 1987.

water intrusion. It will be recalled that the questionnaire addressed to States on this topic 2/ inquired whether problems such as these should be considered and that the replies were, on the whole, that they should be, the specific problems just noted being named. Also included in the expression "measures of conservation and management" are the various forms of cooperation, whether or not institutionalized, concerning the utilization, development, conservation and management of international watercourses, and promotion of the optimal utilization thereof.

(4) Paragraph 2 of article 1 recognizes that the exclusion of navigational uses from the scope of the present articles cannot be complete. As both the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the present articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so numerous that, on any watercourse where navigation takes place or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators charged with development of the watercourse. Paragraph 2 of article 1 has been drafted accordingly. It has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation.

2/ The final text of the questionnaire, as communicated to Member States, is reproduced in Yearbook of the International Law Commission, 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also Yearbook ... 1984, vol. II (Part Two), pp. 82-83, para. 262.

Article 2

Use of terms 3/

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Commentary

(1) Article 2 defines certain terms that are used throughout the draft articles. Other terms that are used only in one article are defined in the article in which they are employed.

(2) Subparagraph (a) defines the term "international watercourse", which is used in the title of the topic and throughout the draft articles. The focus in this paragraph is on the adjective "international", since the term "watercourse" is defined in subparagraph (b). Subparagraph (a) provides that, in order to be regarded as an "international" watercourse, parts of the watercourse in question must be situated in different States. As stated in the commentary to subparagraph (c) of the present article, whether parts of a watercourse are situated in different States "depends on physical factors whose existence can be established by simple observation in the vast majority of cases". 4/ The most common examples would be a river or stream that forms or crosses a boundary, or a lake through which a boundary passes. The word "situated" is not intended to imply that the water in question is static. As will appear from the definition of "watercourse" in subparagraph (b), while the channel, lake bed or aquifer containing the water is itself stationary, the water it contains is in constant motion.

3/ Subparagraph (c) was initially adopted as article 3 in 1987. Subparagraphs (a) and (b) were adopted in 1991.

4/ Yearbook ... 1987, vol. II (Part Two), p. 26.

(3) Subparagraph (b) defines the term "watercourse". While this word is not used in the draft articles except in conjunction with another term (e.g., "international watercourse", "watercourse State", "watercourse agreements"), it is defined separately for purposes of clarity and precision. Since the expression "international watercourse" is defined in subparagraph (a) as a "watercourse" having certain geographical characteristics, a clear understanding of the meaning of the latter term is necessary.

(4) The term "watercourse" is defined as a "system of surface and groundwaters". The term "underground waters" used on first reading was replaced by the term "groundwaters" to establish uniformity throughout the commentary and to better reflect contemporary usage. The phrase "groundwaters" refers to the hydrologic system composed of a number of different components through which water flows, both on and under the surface of the land. These components include rivers, lakes, aquifers, glaciers, reservoirs and canals. So long as these components are interrelated with one another, they form part of the watercourse. This idea is expressed in the phrase, "constituting by virtue of their physical relationship a unitary whole". Thus, water may move from a stream into the ground under the stream bed, spreading beyond the banks of the stream, then re-emerge in the stream, flow into a lake which empties into a river, be diverted into a canal and carried to a reservoir, etc. Because the surface and groundwaters form a system, and constitute by virtue of their physical relationship a unitary whole, human intervention at one point in the system may have effects elsewhere within it. It also follows from the unity of the system that the term "watercourse" does not include "confined" groundwater, i.e., that which is unrelated to any surface water. Some members of the Commission, however, believed that such groundwater should be included within the term "watercourse", provided that the aquifer in which it is contained is intersected by a boundary. It was also suggested that confined groundwater could be the subject of separate study by the Commission with a view to the preparation of draft articles.

(5) Certain members of the Commission expressed doubts about the inclusion of canals among the components of a watercourse because, in their view, the draft

had been elaborated on the assumption that a "watercourse" was a natural phenomenon.

(6) Subparagraph (b) also requires that in order to constitute a "watercourse" for the purposes of the present articles, the system of surface and groundwaters waters must normally flow into a "common terminus". The phrase "flowing into a common terminus" is modified by the word "normally". This represents a compromise between those on the one hand who urged simple deletion of the phrase "common terminus" on the grounds inter alia, that it is hydrologically wrong, misleading and would exclude certain important waters and those on the other hand who urged retention of the notion of common terminus in order to suggest some limit to the geographic scope of the Convention. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purpose of the present articles. Nor does it mean for example that the Danube and the Rhine form a single system merely because at certain times of the year water flows from the Danube as groundwater into the Rhine via Lake Constance. As a matter of common sense and practical judgement the Danube and the Rhine remain separate unitary wholes. The phrase as modified by the word "normally" is intended to reflect modern hydrological knowledge as to the complexity of the movement of water as well as such specific cases as the Rio Grande, the Irawaddy, the Mekong and the Nile. While all the named rivers are "a system of surface and groundwaters constituting by virtue of their physical relationship a unitary whole" they flow to the sea in whole or in part via groundwater, a series of distributaries which may be as much as 300 km removed from each other (deltas), or at certain times of the year empty into lakes and at other times into the sea.

(7) As already indicated, the definition of "watercourse State" which was formerly contained in article 3 has been moved, without change, to subparagraph (c) of article 2. This change was made in order to present together, in a single article on use of terms, definitions of expressions that appear throughout the present articles. (Words that appear in only one article as usually defined in that article.)

(8) The concept of a watercourse or river system is not a novel one. The expression has long been used in international agreements to refer to a river,

its tributaries and related canals. The Treaty of Versailles contains a number of references to "river systems". For example, in declaring various rivers to be "international", the Treaty refers to "all navigable parts of these river systems ... together with lateral canals and channels constructed either to duplicate, or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river". 5/ While the article in question is concerned with navigational uses, there is no doubt that equitable utilization could be affected, or significant harm caused, through the same system of waters by virtue of their very interconnectedness. In the River Oder case, the Permanent Court of International Justice held that the international regime of the river Oder extended, under the Treaty of Versailles, to: "All navigable parts of these river systems ... together with lateral canals or channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems ...". 6/

(9) Provisions similar to those of the Treaty of Versailles may be found in the 1921 Convention instituting the definitive status of the Danube. That agreement refers in its article 1 to the "internationalized river system", which article 2 defines to include "[a]ny lateral canals or waterways which may be constructed ..." 7/

(10) More recently, the 1950 Convention between the Union of Soviet Socialist Republics and Hungary refers in its Articles 1 and 2 to "the water systems of the Tisza river basin". 8/ A series of treaties between Yugoslavia and its

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5/ Treaty of Versailles, article 331, British and Foreign State Papers, 1919, vol. CXII (London, H.M. Stationery Office, 1922), p. 173. See also, e.g. article 362, which refers to "the Rhine river system", ibid., p. 184.

6/ Judgement of 10 September 1929, P.C.I.J., Series A. No. 23.

7/ League of Nations, Treaty Series, vol. XXVI, p. 177.

8/ Convention between the USSR and Hungary concerning measures to prevent floods and to regulate the water regime on the Soviet-Hungarian frontier in the area of the frontier river Tisza, 9 June 1950, United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the utilization of International Rivers for Other Purposes than Navigation (hereinafter referred to

neighbours, 9/ concluded in the mid-1950s, include within their scope, inter alia, "watercourses and water systems" and, in particular, "groundwater". 10/ Two of those treaties contain a broad definition of the expression "water system", which includes "all watercourses (surface or underground, natural or artificial)". 11/

(11) The Indus Waters Treaty of 1960 between India and Pakistan also utilizes the system concept. In the preamble of that agreement, the parties declare that they are "desirous of attaining the most complete and satisfactory utilization of the waters of the Indus system of rivers ..." 12/ The Treaty applies to named rivers, their tributaries and any connecting lakes, 13/ and defines the term "tributary" broadly. 14/

(12) Among more modern treaties, the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, and the annexed Action Plan, 15/ are noteworthy for their holistic approach to

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as Legislative Texts), (United Nations publication, Sales No. 63.V.4), Treaty No. 227, p. 827.

9/ Legislative Texts, Treaty Nos. 228 (with Hungary); 128 (with Albania) and 161 (with Bulgaria). See also the 1964 treaty between Poland and the Soviet Union, United Nations, Treaty Series, vol. 552, p. 175, article 2, para. 3; the 1972 Convention between Switzerland and Italy concerning the protection of frontier waters against pollution; Rev. Gen. de Droit Int'l Publ. p. 265 (1975); and the Frontier Rivers Agreement of 16 September 1971 between Finland and Sweden, Chapter 3, article 1, United Nations, Treaty Series, vol. 825, p. 191.

10/ Ibid., Treaty nos. 228, 128 and 161.

11/ Ibid., Treaty nos. 128 and 228, article 1, para. 3.

12/ Indus Waters Treaty of 19 September 1960 between India and Pakistan, Legislative Texts, Treaty No. 98, p. 300.

13/ Ibid., article 1, para. (3).

14/ Ibid., article 1, para. (2).

15/ United Nations Environment Programme, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, Final Act, Harare, 26-28 May 1987 (United Nations, 1987), reprinted in International

international water resources management. For example, the Action Plan states its objective as being to overcome certain enumerated problems "and thus to promote the development, and implementation of environmentally sound water resources management in the whole river system". 16/ A number of other treaties further demonstrate that States recognize in their practice the importance of dealing with international watercourse systems in their entirety. 17/ International organizations and experts have reached similar conclusions. 18/

Legal Materials, vol. XXVII (1988), p. 1109.

16/ Action Plan, ibid., para. 15.

17/ These agreements include the 1963 Act regarding Navigation and Economic Cooperation between the States of the Niger Basin, Act of 26 October 1963, Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13, (1984) (United Nations publication Sales No. 84.II.A.7), p. 6. See also the Convention of 21 November 1980 creating the Niger Basin Authority, ibid., p. 56; the 1964 Convention and Statutes relating to the development of the Chad Basin, ibid., p. 32; the 1978 Convention relating to the creation of the Gambia River Basin Development Organization, ibid., p. 42; the 1969 Treaty on the River Plate Basin, United Nations, Treaty Series, vol. 875, p. 3; summarized in Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60; the 1961 Treaty relating to development of the water resources of the Columbia River basin; Treaty of 17 January 1961 between Canada and the United States, Legislative Texts, Treaty No. 65; and the 1944 Exchange of notes relating to a study of the use of the waters of the Columbia River Basin, United Nations, Treaty Series, vol. 109, p. 191. It is interesting to note that at least one of the States through whose territory the Columbia River flows has used the term "system" in referring to international watercourses. See "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909", Memorandum of the [United States] State Department, 85th Congress, Second Session, document No. 118 (Washington, D.C., 1958), p. 89.

18/ The work of the Economic Commission for Europe follows this general approach. See, e.g., the Declaration of Policy on the Rational Use of Water, adopted by the ECE in 1984, ECE, Two Decades of Cooperation on Water, document ECE/ENVWA/2 (1988), p. 15; and other instruments contained in that publication. A number of meetings held under United Nations auspices have adopted recommendations urging that international watercourses be dealt with as a unitary whole. See, e.g., the recommendation adopted at the Interregional Meeting on River and Lake Basin Development, held at Addis Ababa in 1988, set forth in Natural Resources/Water Series No. 20 (1990) (United Nations publication, Sales

(13) Subparagraph (c) defines the expression "watercourse States", which will be used throughout the present articles.

(14) The definition set out in subparagraph (c) is one which relies on a geographical criterion, namely whether "part of an international watercourse", as that expression is defined in this article, is situated in the State in question. Whether this criterion is satisfied depends on physical factors whose existence can be established by simple observation in the vast majority of cases.

Article 3

Watercourse agreements 19/

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the

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No. 90.II.A.10), p. 18. The New York Resolution, adopted in 1958 by the International Law Association, contains the "principle of international law" that "A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal)". International law Association (ILA), Report of the Forty-Eighth Conference, New York, 1958, annex II, p. 99, Agreed Principles of International Law, Principle I. The Helsinki Rules, adopted by the ILA in 1966, employ the expression "system of waters" in defining the term "international drainage basin". Helsinki Rules on the Uses of the Waters of International Rivers, article II, comment (a), International Law Association, Report of Fifty-Second Conference, Helsinki, 1966. See also Article I of the 1961 Salzburg Resolution on the Use of International Non-Maritime Waters, adopted by the Institute of International Law (Watershed extending upon the territory of two or more States), Annuaire de l'Institut de droit international, vol. 49, (II) (1961), p. 87, and the Athens Resolution on the Pollution of Rivers and Lakes and International Law, adopted by the Institute in 1979, ibid., vol. 58 (1), Athens session, September 1979, (Basel/Munich 1980). A private group of legal experts, the Inter-American Bar Association, adopted a resolution in 1957 dealing with "every watercourse or system or rivers or lakes ... which may traverse or divide the territory of two or more States ... referred to hereinafter as a 'system of international waters'". Inter-American Bar Association, Proceedings of the 10th Conference held at Buenos Aires from 14-21 November 1957 (2 vols.) (Buenos Aires, 1958), reproduced in Yearbook ... 1974, vol. II (Part Two), p. 208, Document A/5409, para. 1092. The need to regulate and develop an international watercourse as a whole has also been recognized by such individual experts as H.A. Smith, in The Economic Uses of International Rivers (1931), pp. 150-151; James Brierly, in The Law of Nations (5th ed. 1955), p. 204; and Johan Lammers, in Pollution of International Watercourses (1984), pp. 19-20.

19/ Initially adopted as article 4 in 1987.

provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Commentary

(1) The diversity characterizing individual watercourses and the consequent difficulty in drafting general principles that will apply universally to various watercourses throughout the world have been recognized by the Commission from the early stages of its consideration of the topic. Some States and scholars have viewed this pervasive diversity as an effective barrier to the progressive development and codification of the law on the topic on a universal plane. But it is clear that the General Assembly, aware of the diversity of watercourses, has nevertheless assumed that the subject is one suitable for the Commission's mandate.

(2) During the course of its work on the present topic, the Commission has developed a promising solution to the problem of the diversity of international watercourses and the human needs they serve: that of a framework agreement, which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements. This approach recognizes that optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal

principles concerning the uses of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly. 20/

(3) There are precedents for such framework agreements in the field of international watercourses. An early illustration is the Convention relating to the Development of Hydraulic Power Affecting more than One State (Geneva, 9 December 1923), 21/ and the Treaty of the River Plate Basin (Brasilia, 23 April 1969). 22/

(4) Paragraph 1 of article 3 makes specific provision for the framework-agreement approach, under which the present articles may be tailored to fit the requirements of specific international watercourses. This paragraph thus defines "watercourse agreements" as those which "apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof". The phrase "apply and adjust" is intended to indicate that, while the Commission contemplates that agreements relating to specific international watercourses will take due account of the provisions of the present articles, the latter are essentially residual in character. The States whose territories include a particular international watercourse will thus remain free not only to apply the provisions of the present articles, but also to adjust them to the special characteristics and uses of that watercourse or of part thereof.

(5) Paragraph 2 of article 3 further clarifies the nature and subject-matter of "watercourse agreements", as that expression is used in the present articles, as well as the conditions under which such agreements may be entered into. The

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20/ See, in this regard, the conclusions contained in the commentary (paras. (2) and (4)) to article 3 as provisionally adopted by the Commission at its thirty-second session (Yearbook ... 1980, vol. II (Part Two), pp. 112-113), in the Commission's report on its thirty-sixth session (Yearbook ... 1984, vol. II (Part Two), p. 88, para. 285) and its report on its thirty-eighth session (Yearbook ... 1986, vol. II (Part Two), p. 63, para. 242).

21/ League of Nations, Treaty Series, vol. XXXVI, p. 75; see Article 4 thereof.

22/ United Nations, Treaty Series, vol. 875, p. 3; see also Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60. The States parties are Argentina, Bolivia, Brazil, Paraguay and Uruguay.

first sentence of the paragraph, in providing that such an agreement "shall define the waters to which it applies", emphasizes the unquestioned freedom of watercourse States to define the scope of the agreements they conclude. It recognizes that watercourse States may confine their agreement to the main stem of a river forming or traversing an international boundary, include within it the waters of an entire drainage basin, or take some intermediate approach. The requirement to define the waters also serves the purpose of affording other potentially concerned States notice of the precise subject-matter of the agreement. The opening phrase of the paragraph emphasizes that there is no obligation to enter into such specific agreements.

(6) The second sentence of paragraph 2 deals with the subject-matter of watercourse or system agreements. The language is permissive, affording watercourse States a wide degree of latitude, but a proviso is included to protect the rights of watercourse States that are not parties to the agreement in question. The sentence begins by providing that such an agreement "may be entered into with respect to an entire international watercourse". Indeed, technical experts consider that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, including all watercourse States as parties to the agreement. Examples of treaties following this approach are those relating to the Amazon, the Plate, the Niger and Chad basins. 23/ Moreover, some issues arising out of the pollution of international watercourses necessitate cooperative action throughout an entire watercourse. An example of instruments responding to the need for unified treatment of such problems is the Convention for the protection of the Rhine against Chemical Pollution (Bonn, 1976). 24/

(7) However, system States must be free to conclude system agreements "with respect to any part" of an international watercourse or a particular project, programme or use, provided that the use by one or more other system States of the

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23/ See the discussion of these agreements in the first report of Mr. Schwebel, Yearbook ... 1979, vol. II (Part One), pp. 167-168, document A/CN.4/320, paras. 93-98.

24/ Ibid., pp. 168-169, para. 100.

waters of the international watercourse system is not, to a significant extent, affected adversely.

(8) Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins: the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger, the Nile, the Rhine, the Volta and the Zambezi basins. 25/ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse, which are effective between only some of the States situated on it.

(9) The Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin, published by FAO 26/ indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system.

(10) There is often a need for subsystem agreements and for agreements covering limited areas. The differences between the subsystems of some international watercourses, such as the Indus, the Plate and the Niger, are as marked as those between separate drainage basins. Agreements concerning subsystems are likely to be more readily attainable than agreements covering an entire international watercourse, particularly if a considerable number of States are invclved. Moreover, there will always be problems whose solution is of interest only to some of the States whose territories are bordered or traversed by a particular international watercourse.

(11) There does not appear to be any sound reason for excluding either subsystem or localized agreements from the application of the framework agreement. A major purpose of the present articles is to facilitate the negotiation of agreements concerning international watercourses, and this purpose encompasses all agreements, whether basin-wide or localized, whether general in nature or dealing with a specific problem. The framework agreement, it is to be hoped, will provide watercourse States with firm common ground as a basis for negotiations - which is what watercourse negotiations lack most at the present time. No

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25/ Ibid., p. 170, para. 108 (table).

26/ FAO, Legislative Study No. 15 (Rome, 1978).

advantage is seen in confining the application of the present articles to single agreement embracing an entire international watercourse.

(12) At the same time, if a watercourse agreement is concerned with only part of the watercourse or only a particular project, programme or use relating thereto, it must be subject to the proviso that the use, by one or more other watercourse States not parties to the agreement, of the waters of the watercourse is not, to a significant extent, adversely affected by the agreement. Otherwise, a few States of a multi-State international watercourse could appropriate a disproportionate amount of its benefits for themselves or unduly prejudice the use of its waters by watercourse States not parties to the agreement in question. Such results would run counter to fundamental principles which will be shown to govern the non-navigational uses of international watercourses, such as the right of all watercourse States to use an international watercourse in an equitable and reasonable manner and the obligation not to use a watercourse in such a way as to injure other watercourse States. 27/

(13) In order to fall within the proviso, however, the adverse effect of a watercourse agreement on watercourse States not parties to the agreement must be "significant". If those States are not adversely affected "to a significant extent", other watercourse States may freely enter into such a limited watercourse agreement. Because of the dual meaning of the term "appreciable" as both "measurable" and "significant" it was decided to use the latter term throughout the text. This is not intended to raise the applicable standard.

(14) The expression "to a significant extent" is intended to require that the effect is one that can be established by objective evidence (provided the evidence can be secured). There must moreover be a real impairment of use. Situations for example such as were involved in the Lake Lanoux case (see paras. 19-20 below), in which Spain insisted upon delivery of Lake Lanoux water through

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27/ The second sentence of paragraph 2 is based on the assumption, well founded in logic as well as in State practice, that less than all watercourse States would not conclude an agreement that purported to apply to an entire international watercourse. If such an agreement were concluded, however, its implementation would have to be consistent with paragraph 2 of article 3 for the reasons stated in paragraph (12) of the commentary.

the original system are among those sought to be excluded. The arbitral tribunal found that in that case:

> ... thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters ...; at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; ... 28/

The Tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works:

> ... would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests ... Neither in the dossier nor in the pleadings in this case is there any trace of such an allegation. 29/

In the absence of any assertion that Spanish interests were affected in a tangible way, the tribunal held that Spain could not require maintenance of the natural flow of the waters. It should be noted that the French proposal relied upon by the tribunal was arrived at only after a long-drawn-out series of negotiations beginning in 1917, which led to, inter alia, the establishment of a mixed commission of engineers in 1949 and the presentation in 1950 of a French proposal (later replaced by the plan on which the tribunal pronounced) which would have significantly affected the use and enjoyment of the waters in question by Spain. 30/

(15) At the same time, the term "significant" is not used in the sense of "substantial". What are to be avoided are localized agreements, or agreements

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28/ International Law Reports, 1957 (London), vol. 24 (1961), p. 123, para. 6 (first subparagraph) of the arbitral award. Original French text of the award in United Nations, Reports of International Arbitral Awards, vol. XII (Sales No. 63.V.3), pp. 281 et seq.; partial translation in Yearbook ... 1974, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

29/ International Law Reports, 1957 ..., p. 123, para. 6 (third subparagraph) of the arbitral award.

30/ Ibid., pp. 105-108. See the discussion of this arbitration in the Special Rapporteur's second report, Yearbook ... 1986, vol. II (Part One), pp. 116 et seq., document A/CN.4/399 and Add.1 and 2, paras. 111-124.

concerning a particular project, programme or use, which have a significant adverse effect upon third watercourse States. While such an effect must be capable of being established by objective evidence and not be trivial in nature, it need not rise to the level of being substantial.

(16) Paragraph 3 of article 3 addresses the situation in which one or more watercourse States consider that adjustment or application of the provisions of the present articles to a particular international watercourse is required because of the characteristics and uses of that watercourse. In that event, it requires that other watercourse States enter into consultations with the State or States in question with a view to negotiating, in good faith, an agreement or agreements concerning the watercourse.

(17) Moreover, watercourse States are not under an obligation to conclude an agreement before using the waters of the international watercourse. To require conclusion of an agreement as a pre-condition of use would be to afford watercourse States the power to veto a use by other watercourse States of the waters of the international watercourse by simply refusing to reach agreement. Such a result is not supported by the terms or the intent of article 3. Nor does it find support in State practice or international judicial decisions (indeed, the Lake Lanoux arbitral award negates it).

(18) Even with these qualifications, the Commission is of the view that the considerations set forth in the preceding paragraphs, especially paragraph (12), import the necessity of the obligation set out in paragraph 3 of article 3. Furthermore, the existence of a principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the 1957 arbitral award in the Lake Lanoux case.

(19) That case involved a proposal by the French Government to carry out certain works for the utilization of the waters of Lake Lanoux, waters which flowed into the Carol River and on to the territory of Spain. Consultations and negotiations over the proposed diversion of waters from Lake Lanoux took place between the Governments of France and Spain intermittently from 1917 until 1956. Finally, France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish border. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary

to the Treaty of Bayonne of 26 May 1866 between France and Spain and the Additional Act of the same date. Spain claimed that, under the Treaty and the Additional Act, such works could not be undertaken without the previous agreement of France and Spain. Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne and of the Additional Act if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

(20) It is important to note that the obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France not merely by reason of the provisions of the Treaty of Bayonne and the Additional Act, but as a principle to be derived from authorities. Moreover, while the arbitral tribunal based some of its reasoning relating to the obligation to negotiate on the provisions of the Treaty and the Additional Act, it by no means confined itself to interpreting those provisions. In holding against the Spanish contention that Spain's agreement was a pre-condition of France's proceeding, the tribunal addressed the question of the obligation to negotiate as follows:

> In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a "right of assent", a "right of veto", which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.
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> That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus one speaks, although often inaccurately, of the "obligation of negotiating an agreement". In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration

> adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith... 31/
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> ... In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements; there would thus appear to be an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. ... 32/

(21) For these reasons, paragraph 3 of article 3 requires watercourse States to enter into consultations, at the instance of one or more of them, with a view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question.

Article 4

Parties to watercourse agreements 33/

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed

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31/ International Law Reports, 1957 ..., p. 128, para. 11 (second and third subparagraphs) of the arbitral award.

32/ Ibid., pp. 129-130, para. 13 (first subparagraph) of the arbitral award. The obligation to negotiate has also been addressed by the ICJ in cases concerning fisheries and maritime delimitation. See, for example, the Fisheries Jurisdiction cases, I.C.J. Reports 1974, pp. 3 and 175; the North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 3; the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 18, at pp. 59-60, paras. 70-71; and the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984, p. 246, at pp. 339-340, para. 230.

33/ Initially adopted as article 5 in 1987.

watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Commentary

(1) The purpose of article 4 is to identify the watercourse States that are entitled to participate in consultations and negotiations relating to agreements concerning part or all of an international watercourse, and to become parties to such agreements.

(2) Paragraph 1 is self-explanatory. When an agreement deals with an entire international watercourse, there is no reasonable basis for excluding a watercourse State from participation in its negotiation, from becoming a party thereto, or from participating in any relevant consultations. It is true that there may be basin-wide agreements that are of little interest to one or more watercourse States. But, since the provisions of these agreements are intended to be applicable throughout the watercourse, the purpose of the agreements would be stultified if every watercourse State were not given the opportunity to participate.

(3) Paragraph 2 is concerned with agreements that deal with only part of the watercourse. It provides that any watercourse State whose use of the watercourse may be significantly affected by the implementation of an agreement applying to only a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations and negotiations relating to such a proposed agreement, to the extent that its use is thereby affected, and is further entitled to become a party to the agreement. The rationale is that, if the use of water by a State can be affected significantly by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of that State.

(4) Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, States A and B, whose common border is the River Styx, agree that each may divert 40 per cent of the river flow for domestic consumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon

leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion.

(5) The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a set of draft articles that are to provide general principles for the guidance of States in concluding agreements on the use of fresh water should ensure that State C has the opportunity to join in consultations and negotiations, as a prospective party, with regard to proposed action by States A and B that would substantially reduce the amount of water that flowed through State C's territory.

(6) The right is formulated as a qualified one. It must appear that there will be a significant effect upon the use of water by a State in order for it to be entitled to participate in consultations and negotiations relating to the agreement, and to become a party thereto. If a watercourse State would not be affected by an agreement regarding a part or an aspect of the watercourse, the physical unity of the watercourse does not of itself require that the State have these rights. The participation of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation.

(7) The meaning of the term "significant" is explained in paragraphs (14) and (15) of the commentary to article 3. As indicated there, it is not used in the sense of "substantial". A requirement that a States's use must be substantially affected before it would be entitled to participate in consultations and negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed action is likely to be far from clear at the outset of negotiations. The Lake Lanoux decision illustrates the extent to which plans may be modified as a result of negotiations and the extent to which such modification may favour or harm a third State. That State should be required to establish only that its use may be affected to a significant extent.

(8) The right of a watercourse State to participate in consultations and negotiations concerning a limited watercourse agreement is further qualified. The State is so entitled only "to the extent that its use is thereby affected", i.e. to the extent that implementation of the agreement would affect its use of the watercourse. The watercourse State is not entitled to participate in consultations or negotiations concerning elements of the agreement whose implementation would not affect its use of the waters, for the reasons given in paragraph (6) of the present commentary. The right of the watercourse State to become a party to the agreement is not similarly qualified, because of the technical problem of a State becoming a party to a part of an agreement. This matter would most appropriately be dealt with on a case-by-case basis: in some instances, the State concerned might become a party to the elements of the agreement affecting it via a protocol; in others, it might be appropriate for it to become a full party to the agreement proper. The most suitable solution in each case will depend entirely on the nature of the agreement, the elements of it that affect the State in question and the nature of the effects involved.

(9) Paragraph 2 should not, however, be interpreted as suggesting that an agreement dealing with an entire watercourse or with a part or an aspect thereof should exclude decision-making with regard to some or all aspects of the use of the watercourse through procedures in which all watercourse States participate. For most, if not all, watercourses, the establishment of procedures for coordinating activities throughout the system is highly desirable and perhaps necessary, and those procedures may well include requirements for full participation by all watercourse States in decisions dealing with only a part of the watercourse. However, such procedures must be adopted for each watercourse by the watercourse States, on the basis of the special needs and circumstances of the watercourse. Paragraph 2 is confined to providing that, as a matter of general principle, a watercourse State does have the right to participate in consultations and negotiations concerning a limited agreement which may affect that State's interests in the watercourse, and to become a party to such an agreement.

Part II

GENERAL PRINCIPLES

Article 5

Equitable and reasonable utilization and participation 34/

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Commentary

(1) Article 5 sets out the fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization, which is laid down and elaborated upon in paragraph 1. The principle of equitable participation, which complements the rule of equitable utilization, is set out in paragraph 2.

(2) Paragraph 1 states the basic rule of equitable utilization. Although cast in terms of an obligation, the rule also expresses the correlative entitlement, namely that a watercourse State has the right, within its territory, to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse. Thus a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to exceed its right to equitable utilization or, in somewhat different terms, not to deprive other watercourse States of their right to equitable utilization.

(3) The second sentence of paragraph 1 elaborates upon the concept of equitable utilization, providing that watercourse States shall if they choose to use and

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34/ Initially adopted as article 6 in 1987.

develop an international watercourse do so with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse. The expression "with a view to" indicates that the attainment of optimal utilization and benefits is the objective to be sought by watercourse States in utilizing an international watercourse. Attaining optimal utilization and benefits does not mean achieving the "maximum" use, the most technologically efficient use, or the most monetarily valuable use much less short-term gain at the cost of long-term loss. Nor does it imply that the State capable of making the most efficient use of a watercourse - whether economically, in terms of avoiding waste, or in any other sense - should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each. It should also be mentioned that in line with the principle of sustainability "Water resources development and management should be planned in an integrated manner, taking into account long-term planning needs and those with narrower horizons". Such management and development "should incorporate in particular, the environmental, economic and social considerations". It should "include the requirements of all users as well as those relating to prevention and mitigation of water-related hazards and constitute an integral part of the social economic development planning process". 35/

(4) This goal must not be pursued blindly, however. The concluding phrase of the second sentence emphasizes that efforts to attain optimal utilization and benefits must be "consistent with adequate protection" of the international watercourse. The expression "adequate protection" is meant to cover not only measures such as those relating to conservation, security and water-related disease, but also measures of "control" in the technical, hydrological sense of the term, such as those taken to regulate flow, to control floods, pollution and erosion, to mitigate drought and to control saline intrusion. In view of the

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35/ See The United Nations Programme of Action from Rio, The Earth Summit, Agenda 21, Chap. 18 "Protection of the quality and supply of freshwater resources: Application of integrated approaches to the development, management and use of water resources", para. 18, 16, p. 169.

fact that any of these measures or works may limit to some degree the uses that otherwise might be made of the waters by one or more of the watercourse States, the second sentence speaks of attaining optimal utilization and benefits "consistent with" adequate protection. It should be added that, while primarily referring to measures undertaken by individual States, the expression "adequate protection" does not exclude cooperative measures, works or activities undertaken by States jointly.

(5) Paragraph 2 embodies the concept of equitable participation. The core of this concept is cooperation between watercourse States through participation, on an equitable and reasonable basis, in measures, works and activities aimed at attaining optimal utilization of an international watercourse, consistent with adequate protection thereof. Thus the principle of equitable participation flows from, and is bound up with, the rule of equitable utilization set out in paragraph 1. It recognizes that, as concluded by technical experts in the field, cooperative action by watercourse States is necessary to produce maximum benefits for each of them, while helping to maintain an equitable allocation of uses and affording adequate protection to the watercourse States and the international watercourse itself. In short, the attainment of optimal utilization and benefits entails cooperation between watercourse States through their participation in the protection and development of the watercourse. Thus watercourse States have a right to the cooperation of other watercourse States with regard to such matters as flood-control measures, pollution-abatement programmes, drought-mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works and environmental protection, as appropriate under the circumstances. Of course, for greatest effectiveness, the details of such cooperative efforts should be provided for in one or more watercourse agreements. But the obligation and correlative right provided for in paragraph 2 are not dependent on a specific agreement for their implementation.

(6) The second sentence of paragraph 2 emphasizes the affirmative nature of equitable participation by providing that it includes not only "the right to utilize the watercourse", but also the duty to cooperate actively with other watercourse States "in the protection and development" of the watercourse. This duty to cooperate is linked to article 8 on the general obligation to cooperate

in relation to the use, development and protection of international watercourses. 36/ While not stated expressly in paragraph 2, the right to utilize an international watercourse referred to in the second sentence carries with it an implicit right to the cooperation of other watercourse States in maintaining an equitable allocation of the uses and benefits of the watercourse. The latter right is elaborated in greater detail in article 8 on cooperation.

(7) In the light of the foregoing explanations of the provisions of article 5, the following paragraphs provide a brief discussion of the concept of equitable utilization and a summary of representative examples of support for the doctrine.

(8) There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every State whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States. 37/ This fundamental principle of "equality of right" does not, however, mean that each watercourse State is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The scope of a State's rights of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.

(9) In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a

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36/ See Yearbook ... 1988, vol. II (Part Two), paras. 95-99; see also the Special Rapporteur's third report, document A/CN.4/406 and Add.1 and 2, para. 59.

37/ See, for example, commentary (a) to article IV of the Helsinki Rules on the Uses of the Waters of International Rivers (hereinafter referred to as "Helsinki Rules"), adopted by the International Law Association in 1966 (ILA, Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 486-487).

"conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, 38/ and can best be achieved on the basis of specific watercourse agreements.

(10) A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses - including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases - reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field. 39/

(11) The basic principles underlying the doctrine of equitable utilization are reflected, explicitly or implicitly, in numerous international agreements between

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38/ See, for example, article 3 of the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law at its Salzburg session in September 1961, which reads:

"Article 3

"If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances."

(Annuaire de l'Institut de droit international, 1961 (Basel), vol. 49, tome II, p. 382; see also Yearbook ...1 974, vol. II (Part Two), p. 202, document A/5409, para. 1076.)

39/ See, for example, the authorities surveyed in the Special Rapporteur's second report, Yearbook ... 1986, vol. II (Part One), pp. 103 et seq., document A/CN.4/399 and Add.1 and 2, paras. 75-168.

States in all parts of the world. 40/ While the language and approaches of these agreements vary considerably, 41/ their unifying theme is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application. This is true of treaty provisions relating to both contiguous 42/ and successive 43/ watercourses.

(12) A number of modern agreements, rather than stating a general guiding principle or specifying the respective rights of the parties, go beyond the principle of equitable utilization by providing for integrated river-basin

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40/ See, for example, the agreements surveyed in the third report of Mr. Schwebel, Yearbook ... 1982, vol. II (Part One) (and corrigendum), pp. 76-82, document A/CN.4/348, paras. 49-72; the authorities discussed in the Special Rapporteur's second report (see footnote 39 above); and the agreements listed in annexes I and II to chap. II of the latter report.

41/ See the examples referred to in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2.

42/ The expression "contiguous watercourse" is used here to mean a river, lake or other watercourse which flows between or is located upon, and is thus "contiguous" to, the territories of two or more States. Such watercourses are sometimes referred to as "frontier" or "boundary" waters. The Special Rapporteur's second report contains an illustrative list of treaty provisions relating to contiguous watercourses, arranged by region, which recognize the equality of the rights of the riparian States in the use of the waters in question (ibid., chap. II, annex I).

43/ The expression "successive watercourse" is used here to mean a watercourse which flows ("successively") from one State to another State or States. According to Lipper, "all of the numerous treaties dealing with successive rivers have one common element - the recognition of the shared rights of the signatory States to utilize the waters of an international river" (J. Lipper, "Equitable utilization", The Law of International Drainage Basins, A.H. Garretson, R.D. Hayton and C.J. Olmstead, eds. (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 33). The Special Rapporteur's second report contains an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters, or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned (document A/CN.4/399 and Add.1 and 2, chap. II, annex II).

management. 44/ These instruments reflect a determination to achieve optimal utilization and benefits through organizations competent to deal with an entire international watercourse.

(13) A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner. 45/ While some States have, on occasion, asserted the doctrine of

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44/ See especially the recent agreements concerning African river basins, including: the Agreement of 24 August 1977 for the establishment of the Organization for the management and Development of the Kagera River Basin (United Nations, Treaty Series, vol. 1089, p. 165); the Convention relating to the status of the Senegal River and the Convention establishing the Organization for the Development of the Senegal River, both signed at Nouakchott on 11 March 1972 (United Nations, Treaty concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), pp. 16 and 21, respectively; discussed in the Special Rapporteur's third report, document A/CN.4/406 and Add.1 and 2, paras. 21 et seq.); the Act of 26 October 1963 regarding navigation and economic cooperation between the States of the Niger Basin (United Nations, Treaty Series, vol. 587, p. 9) and the Agreement of 25 November 1964 concerning the Niger River Commission and the Navigation and Transport on the River Niger (ibid., p. 19); the 1965 Convention between Gambia and Senegal for the integrated development of the Gambia River Basin (Cahiers de l'Afrique équatoriale (Paris), 6 March 1965), as well as the 1968 and 1973 agreements concerning the same basin; and the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin (Official Gazette of the Federal Republic of Cameroon (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003).

See also the Treaty of the River Plate Basin of 23 April 1969 (see footnote 22 above).

45/ See generally the survey contained in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2, paras. 78-99.

absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States. 46/

(14) A number of intergovernmental and non-governmental bodies have adopted declarations, statements of principles, and recommendations concerning the non-navigational uses of international watercourses. These instruments provide additional support for the rules contained in article 5. Only a few representative examples will be referred to here. 47/

(15) An early example of such an instrument is the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24 December 1933, 48/ which includes the following provisions:

46/ A well-known example is the controversy between the United States of America and Mexico over the waters of the Rio Grande. This dispute produced the "Harmon Doctrine" of absolute sovereignty but was ultimately resolved by the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes. See the Special Rapporteur's discussion of this dispute and its resolution in his second report (ibid., paras. 79-87), where he concluded that "the 'Harmon Doctrine' is not, and probably never has been, actually followed by the State that formulated it [i.e. the United States]" (ibid., para. 87).

See also the examples of the practice of other States discussed in the same report (ibid., paras. 88-91).

47/ See generally the collection of such instruments in the report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers" and the supplement thereto (Yearbook ... 1974, vol. II (Part Two), p. 33, document A/5409, and p. 265, document A/CN.4/274). See also the representative examples of such instruments discussed by the Special Rapporteur in his second report, document A/CN.4/399 and Add.1 and 2 (see footnote 38 above), paras. 134-155.

48/ The International Conferences of American States, First Supplement 1933-1940 (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88. See the reservations by Venezuela and Mexico and the declaration by the United States of America, ibid., pp. 105-106. All these texts are reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A.

...

2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right, however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State over the margin under its jurisdiction.

...

4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers.

(16) Another Latin-American instrument, the Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay and Uruguay) at their Fourth Meeting, from 1 to 3 June 1971, 49/ contains the Declaration of Asunción on the Use of International Rivers, paragraphs 1 and 2 of which provide:

1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.

2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.

(17) The United Nations Conference on the Human Environment, held in 1972, adopted the Declaration on the Human Environment (Stockholm Declaration), 50/ Principle 21 of which provides:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their

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49/ Text reproduced in OAS, Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales), 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in Yearbook ... 1974, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

50/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Conference also adopted an "Action Plan for the Human Environment", 51/ Recommendation 51 of which provides:

Recommendation 51

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for cooperation between interested States for water resources common to more than one jurisdiction.

...

(b) The following principles should be considered by the States concerned when appropriate:

...

(ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;

(iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;

...

(18) The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held at Mar del Plata (Argentina) in 1977, 52/ contains a number of recommendations and resolutions concerning the management and utilization of water resources. Recommendation 7 calls upon States to frame "effective legislation ... to promote the efficient and equitable use and protection of

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51/ Ibid., chap. II, sect. B.

52/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), part one.

water and water-related eco-systems". 53/ With regard to "international co-operation", the Action Plan provides, in Recommendations 90 and 91:

> 90. It is necessary for States to cooperate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such cooperation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, inter alia, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.
>
> 91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and cooperation. 54/

(19) In a report submitted in 1971 to the Committee on Natural Resources of the Economic and Social Council, the Secretary-General recognized that: "Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers." 55/ The report went on to note that international water resources, which were defined as water in a natural hydrological system shared by two or more countries, offered "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action." 56/

(20) The Asian-African Legal Consultative Committee in 1972 created a Standing Sub-Committee on international rivers. In 1973, the Sub-Committee recommended to the plenum that it consider the Sub-Committee's report at an opportune time at a future session. The revised draft propositions submitted by the Sub-Committee's

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53/ Ibid., p. 11.

54/ Ibid., p. 53.

55/ E/C.7/2/Add.6, para. 1.

56/ Ibid., para. 3.

Rapporteur follow closely the Helsinki Rules adopted in 1966 by the International Law Association, 57/ which are discussed below. Proposition III provides in part:

> 1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.
>
> 2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case. 58/

(21) International non-governmental organizations have reached similar conclusions. At its Salzburg session, in 1961, the Institute of International Law adopted a resolution concerning the non-navigational uses of international watercourses. 59/ This resolution, entitled "Utilization of non-maritime international waters (except for navigation)" provides in part for the right of each watercourse State to utilize the waters of a river that traverse or border

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57/ See ILA, Report of the Fifty-second Conference, Helsinki (1966), p. 484.

58/ The next paragraph of proposition III contains a non-exhaustive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. See Asian-African Legal Consultative Committee, Report of the Fourteenth Session held at New Delhi (10-18 January 1973) (New Delhi), pp. 7-14; text reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367. The Committee's work on the law of international rivers was suspended in 1973, following the Commission's decision to take up the topic. However, in response to urgent requests, the topic was again placed on the Committee's agenda at its twenty-third session, held at Tokyo in May 1983, in order to monitor progress in the work of the Commission. See the statements made by the Committee's observers at the Commission's thirty-sixth session (Yearbook ... 1984, vol. I, p. 334, 1869th meeting, para. 42) and thirty-seventh session (Yearbook ... 1985, vol. I, p. 167, 1903rd meeting, para. 21).

59/ Annuaire de l'Institut de droit international, 1961 (Basel), vol. 49, tome II, pp. 381-384; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076. The resolution, which was based on the final report of the Rapporteur, Juraj Andrassy, submitted at the Institute's Neuchâtel session in 1959 (Annuaire de l'Institut de droit international, 1959 (Basel), vol. 48, tome I, pp. 319 et seq.), was adopted by 50 votes to none, with one abstention.

its territory and for dispute settlement on the basis of equity should disagreements arise.

(22) The International Law Association (ILA) has prepared a number of drafts relating to the topic of the non-navigational uses of international watercourses. 60/ Perhaps the most notable of these for present purposes is that entitled "Helsinki Rules on the Uses of the Waters of International Rivers", adopted by the Association at its Fifty-second Conference, held at Helsinki in 1966. 61/ Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains the following provision:

Article IV

> Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

(23) Decisions of international courts and tribunals lend further support to the principle that a State may not allow its territory to be used in such a manner as to cause injury to other States. 62/ In the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse States have equal and correlative rights to the uses and benefits of the

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60/ The first of these drafts was the resolution adopted by the Association at its Forty-seventh Conference, held at Dubrovnik in 1956, and among the most recent was the resolution on the law of international groundwater resources which it adopted at its Sixty-second Conference, held at Seoul in 1986. See part II of the report of the Committee on International Water Resources Law, entitled "The law of international ground-water resources" (ILA, Report of the Sixty-second Conference, Seoul, 1986 (London, 1987), pp. 238 et seq.).

61/ For the texts of the Helsinki Rules and the commentaries thereto, see ILA, Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 484 et seq.; reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

62/ See the discussion of international judicial decisions and arbitral awards, including the River Oder case, the Diversion of Water from the Meuse case, the Corfu Channel case, the Lake Lanoux arbitration, the Trail Smelter arbitration and other arbitral awards concerning international watercourses, in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 paras. 100-133.

watercourse. An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States. 63/

(24) The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5. Indeed, the rule of equitable and reasonable utilization rests on sound foundations and provides a basis for the duty of States to participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Article 6

Factors relevant to equitable and reasonable utilization 64/

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the population dependent on the watercourse in each watercourse State;

(d) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(e) existing and potential uses of the watercourse;

(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

63/ See the decisions of municipal courts discussed in the Special Rapporteur's second report, ibid., paras. 164-168.

64/ Initially adopted as article 7 in 1987.

(g) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Commentary

(1) The purpose of article 6 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization contained in article 5. The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is an equitable and reasonable utilization in a specific case will therefore depend on a weighing of all relevant factors and circumstances. This process of assessment is to be performed, in the first instance at least, by each watercourse State, in order to assure compliance with the rule of equitable and reasonable utilization laid down in article 5.

(2) Paragraph 1 of article 6 provides that "utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances", and sets forth an indicative list of such factors and circumstances. This provision means that, in order to assure that their conduct is in conformity with the obligation of equitable utilization contained in article 5, watercourse States must take into account, in an ongoing manner, all factors that are relevant to ensuring that the equal and correlative rights of other watercourse States are respected. However, article 6 does not exclude the possibility of technical commissions, joint bodies or third parties also being involved in such assessments, in accordance with any arrangements or agreements accepted by the States concerned.

(3) The list of factors contained in paragraph 1 is indicative, not exhaustive. The wide diversity of international watercourses and of the human needs they serve makes it impossible to compile an exhaustive list of factors that may be relevant in individual cases. Some of the factors listed may be relevant in a particular case while others may not be, and still other factors may be relevant which are not contained in the list. No priority or weight is assigned to the

factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases.

(4) Paragraph 1 (a) contains a list of natural or physical factors. These factors are likely to influence certain important characteristics of the international watercourse itself, such as quantity and quality of water, rate of flow, and periodic fluctuations in flow. They also determine the physical relation of the watercourse to each watercourse State. "Geographic" factors include the extent of the international watercourse in the territory of each watercourse State; "hydrographic" factors relate generally to the measurement, description and mapping of the waters of the watercourse; and "hydrological" factors relate, inter alia, to the properties of the water, including water flow, and to its distribution, including the contribution of water to the watercourse by each watercourse State. Paragraph 1 (b) concerns the water-related social and economic needs of watercourse States. Paragraph 1 (c) is intended to note the importance of account being taken of both the size of the population dependent on the watercourse and the degree or extent of their dependency. Paragraph 1 (d) relates to whether uses of an international watercourse by one watercourse State will have effects on other watercourse States, and in particular whether such uses interfere with uses by other watercourse States. Paragraph 1 (e) refers to both existing and potential uses of the international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case. Paragraph 1 (f) sets out a number of factors relating to measures that may be taken by watercourse States with regard to an international watercourse. The term "conservation" is used in the same sense as in article 1; the term "protection" is used in the same sense as in article 5; the term "development" refers generally to projects or programmes undertaken by watercourse States to obtain benefits from a watercourse or to increase the benefits that may be obtained therefrom; and the expression "economy of use" refers to the avoidance of unnecessary waste of water. Finally, Paragraph 1 (g) relates to whether there are available alternatives to a particular planned or existing use, and whether those alternatives are of a value that corresponds to that of the planned or existing use in question. The

subparagraph calls for an inquiry as to whether there exist alternative means of satisfying the needs that are or would be met by an existing or planned use. The alternatives may thus take the form not only of other sources of water supply, but also of other means - not involving the use of water - of meeting the needs in question, such as alternative sources of energy or means of transport. The term "corresponding" is used in its broad sense to indicate general equivalence in value. The expression "corresponding value" is thus intended to convey the idea of generally comparable feasibility, practicability and cost-effectiveness.

(5) Paragraph 2 anticipates the possibility that, for a variety of reasons, the need may arise for watercourse States to consult with each other with regard to the application of article 5 or paragraph 1 of article 6. Examples of situations giving rise to such a need include natural conditions, such as a reduction in the quantity of water, as well as those relating to the needs of watercourse States, such as increased domestic, agricultural or industrial needs. The paragraph provides that watercourse States are under an obligation to "enter into consultations in a spirit of co-operation". As indicated in paragraph (6) of the commentary to article 5, article 8 spells out in greater detail the nature of the general obligation of watercourse States to cooperate. This paragraph enjoins States to enter into consultations, in a spirit of cooperation, concerning the use, development or protection of an international watercourse, in order to respond to the conditions that have given rise to the need for consultations. Under the terms of this provision, the obligation to enter into consultations is triggered by the fact that a need for such consultations has arisen. While this implies an objective standard, the requirement that watercourse States enter into consultations "in a spirit of co-operation" indicates that a request by one watercourse State to enter into consultations may not be ignored by other watercourse States.

(6) Several efforts have been made at the international level to compile lists of factors to be used in giving the principle of equitable utilization concrete meaning in individual cases. In 1966, the International Law Association adopted the "Helsinki Rules on the Uses of the Waters of International Rivers", 65/ article IV of which deals with equitable utilization (see para. (22) of the

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65/ See footnote 61 above.

commentary to article 5 above), and article V of which concerns the manner in which "a reasonable and equitable share" is to be determined, reading:

Article V

1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

2. Relevant factors which are to be considered include, but are not limited to:

(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

(c) the climate affecting the basin;

(d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin State;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

(7) In 1958, the United States Department of State issued a Memorandum on "Legal aspects of the use of systems of international waters". The Memorandum, which was prepared in connection with discussions between the United States and Canada concerning proposed diversions by Canada from certain boundary rivers, also contains an illustration of factors to be taken into account in the use of an international watercourse in a just and reasonable manner. 66/

(8) Finally, in 1973, the Rapporteur of the Asian-African Legal Consultative Committee's Sub-Committee on international rivers submitted a set of revised draft propositions. In proposition III, paragraphs 1 and 2 deal with equitable utilization (see para. (20) of the commentary to art. 5 above), and paragraph 3 deals with the matter of relevant factors. 67/

(9) The Commission is of the view that an indicative list of factors is necessary to provide guidance for States in the application of the rule of equitable and reasonable utilization set forth in article 5. An attempt has been made to confine the factors to a limited, non-exhaustive list of general considerations that will be applicable in many specific cases. Nevertheless, it perhaps bears repeating that the weight to be accorded to individual factors, as well as their very relevance, will vary with the circumstances.

Article 7

Obligation not to cause significant harm

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:

(a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6;

66/ United States of America, Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909, Memorandum of the State Department of 21 April 1958, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), p. 90.

67/ See footnote 58 above.

(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

Commentary

(1) The Commission in this Article is setting forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case. Optimal use of finite water resources of an international watercourse is considered in light of the interests of each watercourse State concerned. This is in accord with emphasis throughout the draft Articles generally and in Part III in particular on consultations and negotiations concerning planned measures.

(2) The approach of the Drafting Committee was explained by the Chairman as follows:

"(1) The Drafting Committee generally agreed that in certain circumstances 'equitable and reasonable utilization' of an international watercourse may still involve some significant harm to another watercourse State. An example of such a possibility is when one of the watercourse States builds a dam which will benefit hundreds of thousands of people by building hydroelectric power, but which will cause significant harm to a few hundred people in the other riparian State whose recreational fishing will be destroyed by the construction of the dam. Taking into account the factors listed in Article 6, one would most likely conclude in this particular hypothetical case, construction of the dam is reasonable and equitable even though it causes significant harm to the other riparian State.

"(2) However, while the State constructing the dam should be permitted to do so because its activity is within the parameters permitted by Article 5 on 'reasonable and equitable utilization', that State should not be relieved from the obligation to consider the interests of the other riparian State. That obligation is <u>the exercise of due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse States</u>. In our hypothetical case, this means that the State constructing the dam should, even in the design, construction and the operation of the dam, exercise due diligence not to cause significant harm to other riparian States.

"(3) If, despite the equitable and reasonable utilization of the watercourse and the exercise of due diligence, significant harm nevertheless occurs in the other watercourse State, then the parties shall consult: first to verify whether the use of the watercourse is reasonable and equitable; second, to check whether there could be some

ad hoc adjustments to the utilization which could eliminate or minimize the harm; and also, in case harm has occurred, whether compensation is possible for those suffering particular harm." 68/

(3) Paragraph 1 sets forth the general obligation for watercourse States to exercise due diligence in their utilization of an international watercourse in such a way as not to cause significant harm to other watercourse States.

(4) "Due diligence" has been defined to mean: "... a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is exercising it ..."; and "such care as governments ordinarily employ in their domestic concerns". 69/ The obligation of due diligence contained in article 7 sets the threshold for lawful States activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. 70/ It is an obligation of conduct not an obligation of result. What the obligation entails is that a watercourse State whose use causes significant harm can only be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained

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68/ Statement of the Chairman of the Drafting Committee, Mr. Derek Bowett, in introducing the Report of the Drafting Committee to the Plenary of the International Law Commission held on 21 June 1994. See United Nations Document A/CN.4/SR.2353.

69/ The Geneva Arbitration (The Alabama case) reported in J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Vol. I, (1898) pp. 572-73 and 612 respectively.

70/ See generally P. M. Dupuy, La responsibilité internationale des états pour les dommages d'origine technologique et industrielle (1976) and "La responsibilité internationale des états pour les dommages causés par les pollutions transfontières", in OECD, Aspects juridique de la pollution transfrontière (1977), Charles B. Bourne "The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures", Colorado Journal of International Environmental Law and Policy, Vol. 3, pp. 65 to 92 (1992). P. Wouters, "Allocation of the non-navigational uses of international watercourses: Efforts at Codification and the experience of Canada and the United States", The Canadian Yearbook of International Law, Vol XXX (1992) p. 43 et seq.

from abating it. 71/ Therefore, "[t]he State may be responsible ... for not enacting necessary legislation, for not enforcing laws ... for not preventing or terminating an illegal activity, or for not punishing the person responsible for it". 72/

(5) A watercourse State can be deemed to have violated its due diligence obligation only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other watercourse States. 73/

(6) As observed by the ICJ in the Corfu Channel case:

> ... it cannot be concluded from the mere fact of control exercised by a State over its territory that that State necessarily knew or ought to have known, of an unlawful act perpetuated therein, nor that it necessarily knew or should have known the authors. This fact, by itself or apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof. 74/

(7) The obligation of due diligence, as an objective standard, has been formulated in treaties governing the utilization of international watercourses. For example, the Indus Treaty between India and Pakistan provides in Article 4, paragraph 10 that:

> Each party declares its intention to prevent, as far as practicable, undue pollution of the waters of the rivers which might affect adversely uses similar in nature to those to which the waters were put on effective date, and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such a manner as not materially to

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71/ J.G. Lammers, Pollution of International Watercourses, (1984), p. 348.

72/ The American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States, Vol. 2 (1986) Section 601, comment (d), p. 105.

73/ Lammers, op. cit., p. 349.

74/ ICJ, Reports (1949), p. 18.

affect those uses: Provided that the criterion of reasonableness shall be the customary practice to similar situations on the rivers. 75/ (Emphasis supplied).

(8) The obligation of due diligence has also been formulated in the 1982 United Nations Convention on the Law of the Sea. 76/ Article 194, paragraph 1 provides that "States shall take ... all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities ...". This principle was included in the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. In Article 1 thereof, the Contracting States are obliged "... to take all practical steps to prevent the pollution of the sea by the dumping of waste and other matter ...". 77/ The principle is also contained in the 1985 Vienna Convention for the Protection of the Ozone Layer 78/, Article 2 of which obliges the Parties to "take all appropriate measures ... to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer". The 1988 Wellington Convention on the Regulation of Antarctic Mineral Resource Activities 79/ is yet another convention providing the due diligence obligations. Article 7, paragraph 5 of the said convention provides that "[e]ach party shall exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any Antarctic mineral resource activities contrary

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75/ See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the utilization of International Rivers for Other Purposes than Navigation; United Nations Document ST/LEG/SER.B/12, p. 305.

76/ United Nations Document Sales No. E.83.V.5.

77/ United Nations Treaty Series, Vol. 1046, p. 120; also reproduced in ILM, Vol. 11 (1972), p. 1294 ff.

78/ Document UNEP/IG.53/5; also reproduced in ILM Vol. XXVI (1987) p. 1529.

79/ Document AMR/SCM/88/78 (2 June 1988); also reproduced in ILM, Vol. XXVII (1988) p. 872 ff.

to the objectives and principles of this Convention". The Convention on Environmental Impact Assessment in a Transboundary Context also provides in Article 1, paragraph 2 that "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities ... that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation ...". 80/ Furthermore, the 1992 Convention on the protection and use of transboundary watercourses and international lakes provides in Article 2, paragraph 1 that "The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact". 81/

(9) The obligation of due diligence contained in Article 7 was recently dealt with in a dispute between Germany and Switzerland over the latter's failure to require a pharmaceutical company to take certain safety measures and the resulting pollution of the Rhine river. The Swiss Government acknowledged its lack of due diligence in preventing the accident through adequate regulation of its own pharmaceutical industries. 82/

(10) Paragraph 2 deals with a situation where, despite the exercise of due diligence in the utilization of an international watercourse, a use still causes significant harm to other watercourse States. In that circumstance, the provisions of paragraph 2 require that, unless there is an agreement to such use, the State whose use causes the harm consult with the watercourse States which are

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80/ Document E/ECE/1250 (25 February 1991).

81/ UNVWA/R.53 and Add.1.

82/ See New York Times (11 November 1986), p. A1, (12 November 1986) p. A8, (13 November 1986) p. A3. For a full discussion of this situation, see Riccardo-Pisillo-Mazzeschi "Forms of International Responsibility for Environmental Harm" in International Responsibility for Environmental Harm (Francesco Francioni and Tullio Scovazzi, eds.) (1991), p. 31. See also Barron, "After Chernobyl: Liability for Nuclear Accidents under International Law", 25 Columbia Journal of Transnational Law (1987), 652 ff.

suffering the harm. The subject-matter of the consultations is stipulated in subparagraphs (a) and (b) of paragraph 2.

(11) The words "in the absence of agreement to such use" reflect the fact that where the watercourse States concerned have already agreed to such use, the obligations contained in subparagraphs (a) and (b) of paragraph 2 do not arise. In the absence of such agreement however, the watercourse State suffering significant harm may invoke the provisions in subparagraphs (a) and (b) of paragraph 2 thereof.

(12) As Professor Eagleton has observed:

> "Frequently, when a State contemplates a use which is expected to cause serious and lasting injury to the interests of another State in the river, development has not been undertaken until there has been agreement between the States. Such agreements do not follow any particular pattern but resolve immediate problems on an equitable basis." 83/

This process is reflected and strengthened by draft article 12 and the other articles relating to notification, exchange of information, etc. contained in Part III of the draft articles.

(13) The process called for by paragraph 2 is in several respects analogous to the process followed by the International Court of Justice in the Fisheries Jurisdiction case (United Kingdom v. Iceland) merits (1974). 84/ In that case, the Court found the existence of competing rights on the part of the United Kingdom and Iceland. The Court laid down certain general criteria to be applied, analogous to Article 6 of the current draft articles, and went on to state:

> "The most appropriate method for the solution of the dispute was clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties ... 85/ The obligation to

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83/ C. Eagleton, "The law and uses of international rivers", as quoted in Whiteman's Digest of International Law (1966) Vol. II, pp. 874-875.

84/ ICJ, Reports (1974), p. 3 ff. It is recognized that the process called for by para. 2 of draft Art. 7 is one of "consultation". The reference by analogy to the process used in the Fisheries Case with its reference to "negotiation" is not intended to put a gloss on the term used in para. 2.

85/ Ibid., p. 31, para. 73.

> negotiate thus flows from the very nature of the respective rights of the parties; [and] corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes ... 86/ The task before ... [the Parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, [to] ... the facts of the particular situation, and having regard to the interests of other States with established ... rights 87/

(14) Subparagraph (a) of paragraph 2 obliges the parties to consult in order to determine whether the use of the watercourse has been equitable and reasonable taking into account inter alia, the non exhaustive list of factors referred to in Article 6. The burden of proof for establishing that a particular use is equitable and reasonable lies with the State whose use of the watercourse is causing significant harm. 88/ A use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable. In the view of several members of the Commission it was also important to recognize that it is, at the least, highly unlikely that any other form of extreme harm could be balanced by the benefits derived from the activity.

(15) Where, as in the Fisheries case, there is a conflict of uses due in the case of watercourses, for example, to the quantity or quality of the water, it

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86/ Ibid., p. 32, para. 75.

87/ Ibid., p. 33, para. 78. See also The Salzburg Resolution on the Use of International Non-Maritime Waters, 49-II Annuaire de L'Institute de droit international, session de Salzburg 1961, C. Bourne, "Principle" at 65-92, 3 Colorado Journal of International Environmental Law and Policy, (1992), P.K. Wouters, The Canadian Yearbook of International Law Vol. XXX (1992) at pp. 80-86.

88/ "The plaintiff state starts with the presumptive rule in its favour that every state is bound to use the waters of rivers flowing within its territory in such a manner as will not cause substantial injury to a co-riparian state. Having proved such substantial injury, the burden then will be upon the defendant state to establish an appropriate defense, except in those cases where damage results from extra-hazardous pollution and liability is strict. This burden falls on the defendant state by implication from its exclusive sovereign jurisdiction over waters flowing within its territory." See The Law of International Drainage Basins, (eds.) Garretson, Hayton and Olmstead, (Oceana, Dobbs Ferry, N.Y.) (1967) at 113.

may be that all reasonable and beneficial uses cannot be realized to their full extent.

(16) The decision of the Court in the Donauversinkung case is also instructive where it states: "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other". 89/

(17) Subparagraph (b) of paragraph 2 requires the States to consult to see whether ad hoc adjustments should be made to the utilization that is causing significant harm in order to eliminate or reduce the harm; and whether compensation should be paid to those suffering the harm.

(18) The consultations must be conducted in the light of the particular circumstances and would include, in addition to the factors relevant in subparagraph (a), such factors as the extent to which adjustments are economically viable, the extent to which the injured State would also derive benefits from the activity in question 90/ such as a share of hydroelectric power being generated, flood control, improved navigation, etc. In this connection the payment of compensation is expressly recognized as a means of balancing the equities in appropriate cases. 91/

89/ Wurtenberg and Prussia V. Baden (Donauversinkung case) (1927) in Zivilsachen (Berlin, de Govyter) Vol. 116 (1927), Annual Digest of Public International Law Cases, (1927-1928) (London, 1931) p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517, Report of the Sixty-Second International Law Association Conference (Seoul) Part III pp. 275-278, Art. 1 of the "Complementary Rules Applicable to International Water Resources" states, "a basin State shall refrain from and prevent acts or omissions within its territory that will cause substantial injury to any co-basin State, provided that the application of the principle of equitable utilization as set forth in Article IV of the Helsinki Rules does not justify an exception in a particular case. Such an exception shall be determined in accordance with Article V of the Helsinki Rules".

90/ See Donauversinkung case, op. cit.

91/ See Treaty between Canada and the United States relating to Cooperative Development of the Water Resources of the Columbia River Basin, 542 UNTS 246 (1965), Agreement between the United Arab Republic and the Republic of Sudan for the full utilization of the Nile Waters (1960) 453 UNTS 51 and its 1929

(19) The concept of a balancing of interests is expressed in paragraph 9 of the commentary to Article 5 above, which reads as follows:

> ... where the quantity or quality of water is such that all the reasonable and beneficial uses of all the watercourse States cannot be fully realized, a "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equality, and can best be achieved on the basis of specific watercourse agreements.

(20) This concept is reflected in Recommendation 51 adopted by the Stockholm Conference on the Human Environment (1972) which commends the principle that "the net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations concerned". 92/

(21) If consultations do not lead to a solution, the dispute settlement procedures contained in Article 33 of the present draft articles will apply. These procedures have been added by the Commission in second reading in the recognition of the complexity of the issues and the inherent vagueness of the criteria to be applied. The situation is well described by the Lake Lanoux Tribunal which stated:

> It is for each State to evaluate in a reasonable manner and in good faith the situations and rules which will involve it in controversies; its evaluation may be in contradiction with that of other States; in that case, should a dispute arise the Parties normally seek to resolve it by

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predecessor, 93 League of Nations treaty series 44. See also the arrangement between the Tiroler Wasserkraft Werke and the Bayern Werke relating to the construction of the Achensee power station, E. Hartig, Internationale Wasserwirtschft und internationales Recht, Schriftenreihe des osterrichischen Wasserwirtschaftsverbandes Vol. 28/29 (Vienna: Springer Verlag, 1955) pp. 64-65 and in an English translation in United Nations Document ST/LEG/SER.B/12, pp. 469-470, the 1954 Drava Agreement between Austria and Yugoslavia, United Nations Document ibid., p. 513. See further the 1966 Lake Constance Agreement between Austria, the Federal Republic of Germany and Switzerland, United Nations Document ibid., pp. 774, Art. 4 of the Salzburg resolution on the use of international non-maritime water, 49-II, Annuaire de L'institute de droit international, session de Salzburg 1961.

92/ See United Nations Document A/CONF.48/14.

negotiation or, alternatively, by submitting to the authority of a third party. 93/

(22) Some members of the Commission expressed the view that they did not believe that it was useful to include any provisions along the lines of draft Article 7 whether as presently drafted or as drafted in the 1991 text. Others believed that it was essential for the Commission to address the matter either as done in the 1991 text or the present text. The latter view prevailed.

93/ United Nations, Reports of International Arbitral Awards, pp. 310-311.